

Statement of grounds

in relation to the determination of the

Bath and North East Somerset Council
(Restricted Byway BA21/12. Beeks Mill, St Catherine)
Definitive Map Modification Order 2017

11 October 2017

1. Background and Application

- 1.1 On 6 February 2013, Mr Donald MacIntrye of Manor Farm, Langridge, Bath (“the Applicant”) applied to have a BOAT added to the Definitive Map and Statement (“the DM&S”). The Application was accompanied by both documentary evidence and User Evidence Forms (“UEFs”). The route under consideration commences from a junction with St Catherine Lane at grid reference ST 7611 7106 (Point A on the Order Map) and continues in a generally northeasterly direction for approximately 200 metres along a track to the border with South Gloucestershire at grid reference ST 7624 7121 (Point B on the Order Map). This route is hereafter referred to as “the Order Route”.
- 1.2 The land over which the Order Route runs has been in the ownership of Beeks Mill since at least 1933. Beeks Mill was bought in 1965 by Rev. Michael Lane¹ and, after Rev. Lane died, the property was sold to its current owner in September 2009. The Life-Tenant took up occupation around Christmas 2011 once renovations had been completed to Beeks Mill.

2. Consultations

- 2.1 In February 2017 the Authority consulted on the Application with the Applicant, the St Catherine Parish Meeting, local and national user groups, the ward members and the affected Landowners and Life-Tenant. Notices were also erected at either end of the Order Route and on the Authority’s website and the case officer gave a presentation on the Application to a parish meeting.

¹ User 43

2.2 The Authority received a letter of objection from the affected Landowners and representations both in support of, and in opposition to, the Application.

3. Documentary Evidence

3.1 Extensive archival research was undertaken in the Somerset Heritage Centre (“SHC”) in Taunton, the Bath Record Office (“BRO”) and in the Authority’s own records. Additionally, the Applicant, Landowners and Life-Tenant submitted documentary evidence in respect of the Order Route.

3.2 Thorpe’s Map (SHC ref.: DD\NNE/C1375/8) was published in 1742 and shows Bath and the surrounding areas including St Catherine. The Order Route appears to be shown schematically by solid, parallel lines and labelled “*To Marshfield*”. The map was sold on subscription to the travelling public, which could be indicative of routes shown probably being public. Day and Masters’ Map dated 1782 (SHC ref.: D\B\wsm/38/6) and Greenwood’s map dated 1822 (SHC ref.: A\AUS\60) were also produced for the travelling public but they do not show the Order Route.

3.3 The St Catherine Tithe Map (SHC Ref.: D\D/Rt/M/369) and Apportionment (SHC Ref.: D\D/Rt/A/369) were produced in 1840 to locate titheable land in the parish and to show the value of that land. The Order Route runs through enclosure 13 but is not shown on the Tithe Map. Enclosure 13 is identified in the Tithe Apportionment as “*Whitely (Pasture)*” and Tithe was paid on the enclosure.

3.4 Cotterell’s Map was drawn up by order of the Town Council in 1850, primarily to show sewerage pipes and gas mains. Highways were shown as they were constructed, rather than by their rights. Although the section of Beeks Mill Lane to the north of the Order Route is shown by parallel solid lines, the Order Route itself is not shown on Cotterell’s Map.

- 3.5 The Ordnance Survey (“OS”) produced a series of topographic maps at different scales. The large scale 1:2500 maps from the 1870’s onwards provide good evidence of the position of routes but they generally do not provide evidence of status. On the 1886 OS map², the Order Route is shown by a solid line to the east and a dashed line to the west. The route is shown shaded ochre and labelled ‘*Beck’s Lane*’. A solid line crosses the Order Route at its southern terminus. On the 1904 OS map³, the Order Route is shown by a solid line to the east and a dashed line to the west. A solid line again crosses the Order Route at its southern terminus. This shows that the Order Route physically existed in 1886 and 1904 and suggests that it was gated at the southern end; however, these maps do not provide evidence of the existence of public rights as stated on the maps’ disclaimers.
- 3.6 The Inland Revenue produced plans and valuation books under the Finance (1909-10) Act 1910 (SHC Ref.: DD/IR/8/6 and DD/IR/B/8/6) as part of the process to levy a new land tax. Landowners could claim a deduction if a public right of way crossed a hereditament but there was no requirement to do so; consequently, if the landowner did not claim a deduction or if a route was not excluded from a taxable hereditament then this would not provide evidence that a right of way did not exist at the time. The Order Route runs through hereditament 856 which is shaded green and is not shown on the Inland Revenue plan. No reductions are recorded as having been claimed in respect of this hereditament in the valuation book.
- 3.7 In 2014, South Gloucestershire Council and the British Horse Society published a leaflet entitled ‘*Circular Rides in South Gloucestershire: Marshfield 4*’ which states that the Order Route is used “*by kind permission of the owner.*” South Gloucestershire Council have erected a ‘No through road for vehicles’ sign at the northern end of Beeks Mill Lane; however, they are not the owner of the land over which the Order Route runs and this sign itself does not therefore render use of the Order Route to be

² <http://maps.nls.uk/view/122160794>

³ <http://maps.nls.uk/view/122160794>

contentious. Furthermore, a number of witnesses state that it was known that the Order Route was private but the *Sunningwell*⁴ judgement makes it clear that ‘belief’ is not relevant to whether the use is qualifying. A small stone pillar is situated approximately 30 metres north of point B on the Order Map. The words “*2 Marsh Field*” have been crudely scratched into its surface and this does not appear to have been carved by a stonemason, as would be standard practice for a formal milestone. The stone’s origins and intentions are ambiguous and the Authority cannot place significant weight on its presence.

3.8 The Order Route is not recorded in any version of the List of Streets which the Authority is required to keep under section 36(6) of the Highways Act 1980 (“the 1980 Act”); this includes the List of Streets as it stood on 1 January 2006. Additionally, the Order Route is not recorded or referred to in the DM&S or any of the records associated with the creation of the DM&S. A search of the SHC and BRO archives and the Authority’s records did not provide any evidence of any legal orders affecting the Order Route.

3.9 Thorpe’s map suggests that the Order Route physically existed and may have carried public rights in 1742. However, only very limited weight can be applied to this piece of evidence in isolation because of its schematic nature and because it is not possible to determine with a sufficient level of certainty what Thorpe was intending to convey when he included a route on his map. The only other document which provides positive evidence regarding the Order Route are the Ordnance Survey maps which show that the Order Route physically existed in 1886 and 1904 but they do not provide evidence regarding the existence of public rights.

4. User Evidence

4.1 The Authority received 59 statements from members of the public. Although each witness is numbered ‘User 1’, ‘User 2’, ‘User 3’ etc., it

⁴ *R v Oxfordshire County Council and Another ex parte Sunningwell Parish Council* [1999] 3 WLR 160

should be noted that this does not necessary mean that they have used the Order Route themselves. 31 members of the public submitted User Evidence Forms (UEFs); three of these Users⁵ also submitted written statements and several submitted photographs of the recent signage. A further 28 members of the public submitted written statements. These were sent to the Authority through a combination of being submitted via the Applicant, landowners and Life-Tenant and submitted directly to the Authority as a result of the public consultation. The Authority carried out short telephone interviews with those who provided telephone numbers and were contactable.

4.2 Users 22, 33, 36, 53 and 56 stated that they were granted permission to use the Order Route. Users 43, 44, 46 and 57 all stated that the Water Board (formally Bath Corporation Waterworks and latterly Wessex Water) were granted permission to use the Order Route to access Monkswood Reservoir. User 14's motorised vehicular use between 1965 and 1997 was in connection with their employment with the Water Board and they have stated that they were not granted permission to use the Order Route. Furthermore, Users 26 and 50 used the Order Route to access the landowner's house (Beeks Mill); this use was therefore by virtue of an implied licence and 'by right'. Users 22, 26, 33, 36, 50, 53 and 56 have not used the Order Route 'as of right'. Their use does not contribute towards presumed dedication under section 31 of the 1980 Act or at common law and their use therefore is not included in the use which is summarised in paragraphs 4.3 to 4.6 below. All other Users have stated that their use was without force, secrecy or permission.

4.3 **Foot.** The user evidence details pedestrian use dating back to 1935.⁶ The user evidence details pedestrian use of the Order Route by:

- two people⁷ during the 1940s (averaging 12 times per year),
- three people⁸ during the 1950s (averaging 71 times per year),

⁵ Users 22, 27 and 31

⁶ User 6

⁷ Users 6 and 18

⁸ Users 6, 10 and 18

- between three and six people⁹ during each year of the 1960s (averaging 67 times per year),
- between five and 13 people¹⁰ during each year of the 1970s (averaging 38 times per year),
- between 12 and 14 people¹¹ during each year of the 1980s (averaging 31 times per year),
- between 13 and 18 people¹² during each year of the 1990s (averaging 28 times per year),
- between 13 and 19 people¹³ during each year of the 2000s (averaging 49 times per year),
- between 7 and 16 people¹⁴ during each year of the 2010s (averaging 48 times per year).

4.4 **Horse.** The user evidence details horse use dating back to 1935¹⁵. The user evidence details horse use of the Order Route by:

- one person¹⁶ during the 1940s (used '*occasionally*'),
- two people¹⁷ during the 1950s (used '*occasionally*'),
- between two and four people¹⁸ during each year of the 1960s (averaging 112 times per year),
- between three and five people¹⁹ during each year of the 1970s (averaging 82 times per year),
- between 3 and 9 people²⁰ during each year of the 1980s (averaging 65 times per year),
- between nine and 13 people²¹ during each year of the 1990s (averaging 72 times per year),

⁹ Users 6, 10, 11, 14, 18 and 23

¹⁰ Users 1, 6, 7, 10, 11, 14, 16, 18, 19, , 23, 28 and 31

¹¹ Users 1, 3, 7, 10, 11, 14, 16, 18, 19, 23, 28, 30, 31 and 34

¹² Users 1, 3, 7, 9, 10, 11, 13, 14, 16, 18, 19, 21, 23, 27, 28, 30, 31 and 34

¹³ Users 1, 3, 7, 9, 10, 11, 12, 13, 16, 18, 19, 21, 23, 24, 25, 27, 28, 30 and 34

¹⁴ Users 1, 3, 7, 9, 10, 11, 12, 16, 21, 23, 24, 25, 27, 28, 30 and 34

¹⁵ User 6

¹⁶ Users 6

¹⁷ Users 6 and 10

¹⁸ Users 5, 6, 11 and 49

¹⁹ Users 5, 6, 11, 35 and 49

²⁰ Users 2, 3, 5, 8, 11, 16, 28, 34 and 48

²¹ Users 2, 3, 5, 8, 11, 12, 13, 16, 28, 29, 34, 45 and 48

- between six and 11 people²² during each year of the 2000s (averaging 74 times per year),
- between two and six people²³ during each year of the 2010s (averaging 102 times per year).

4.5 **Bicycle/Carriage.** The user evidence details bicycle and horse-drawn carriage use dating back to 1935²⁴. The user evidence details bicycle and horse-drawn carriage use of the Order Route by:

- two people²⁵ during the 1940s (averaging 12 times per year),
- between two and three people²⁶ during the 1950s (averaging 189 times per year),
- between two and three people²⁷ during each year of the 1960s (averaging 25 times per year),
- between three and six people²⁸ during each year of the 1970s (averaging 18 times per year),
- six people²⁹ during each year of the 1980s (averaging 19 times per year),
- six people³⁰ during each year of the 1990s (averaging 14 times per year),
- between five and six people³¹ during each year of the 2000s (averaging 16 times per year),
- between two and six people³² during each year of the 2010s (averaging 16 times per year).

4.6 **Motor Vehicles.** The user evidence details bicycle and carriage use dating back to 1935³³. The user evidence details motor vehicle use of the Order Route by:

²² Users 3, 5, 8, 11, 12, 13, 16, 28, 29, 34 and 45

²³ Users 5, 11, 12, 16, 34 and 45

²⁴ User 6

²⁵ Users 6 and 18

²⁶ Users 4, 6 and 18

²⁷ Users 8, 11 and 18

²⁸ Users 1, 6, 11, 18, 28 and 31

²⁹ Users 1, 11, 18, 28, 30 and 31

³⁰ Users 1, 11, 18, 21, 28, 30 and 31

³¹ Users 1, 11, 18, 21, 28 and 30

³² Users 1, 9, 11, 21, 28 and 30

- one person³⁴ during the 1940s (used '*occasionally*'),
- two people³⁵ during the 1950s (averaging 2.5 times per year),
- between two and four people³⁶ during each year of the 1960s (averaging 17 times per year),
- between four and eight people³⁷ during each year of the 1970s (averaging 24 times per year),
- between nine and 11 people³⁸ during each year of the 1980s (averaging 20 times per year),
- between 12 and 14 people³⁹ during each year of the 1990s (averaging 20 times per year),
- between nine and 13 people⁴⁰ during each year of the 2000s (averaging 48 times per year),
- between six and 11 people⁴¹ during each year between 2010 and 2012 (averaging 31 times per year); the UEFs do not detail any motorised use after 2012.

4.7 On 5 March 2012, the landowners submitted a statement under section 31(6) of the 1980 Act and this was subsequently followed up with a statutory declaration dated 30 March 2012. The statement does not admit the existence of any public rights of way across the land and the statutory declaration demonstrates a lack of intention to dedicate during the intervening period. New gates were erected at point A on the Order Map on 16 December 2011⁴². The Applicant states that various signs stating that the Order Route was private were erected on 25 April 2012⁴³; this is broadly supported by Users 9 and 10 but User 23 states that these were erected in 2011. There is broad consensus that the gates at either end of

³³ User 6

³⁴ Users 6

³⁵ Users 6 and 10

³⁶ Users 5, 6, 10 and 23

³⁷ Users 1, 5, 6, 7, 10, 19, 23 and 31

³⁸ Users 1, 2, 3, 5, 7, 10, 11, 19, 23, 30 and 31

³⁹ Users 1, 2, 3, 5, 7, 9, 10, 11, 13, 16, 19, 23, 30 and 31

⁴⁰ Users 1, 3, 5, 7, 9, 10, 11, 12, 13, 14, 16, 19, 20, 23, 24, 25 and 30

⁴¹ Users 1, 5, 7, 9, 10, 11, 16, 20, 23, 24 and 25

⁴² Evidence appended to Application

⁴³ Evidence appended to Application

the Order Route were locked on 28 June 2012⁴⁴; although, User 1 states that this happened in 2011. Consequently, 5 March 2012 is the latest date on which the public's right to use the Order Route could have been called into question. However, there is conflicting evidence whether or not the public's right to use the Order Route was called into question at an earlier date due to signage.

- 4.8 The Applicant states that at some point prior to 2012 there was a white sign with black lettering reading "*Beeks Mill Bridleway Only*" at point A on the Order Map. User 35 states that the sign was erected in 2001. The presence of this sign is supported by Users 34, 36, 43 and 48 and the Authority's PROW Maintenance and Enforcement Officer for the area was contacted by the Life-Tenant in 2012 enquiring whether this sign could be removed. Although the majority of the witnesses do not have any recollection of this sign, it is significant that both some of those opposed to, and in support of, the Application admit the sign's existence. In this context, and given the Authority's first-hand knowledge of the sign, the Authority concludes that on the balance of probabilities any use in excess of a bridleway was contentious from at least 2001 onwards.
- 4.9 29 users⁴⁵ state that there were no signs deterring public use prior to 2012. 18 users states that there were signs stating that the Order Route was private prior to 2012. User 13 was unsure if there were signs, User 32 states that there was a sign but does not say what it said, User 27 states that there was possibly a private sign and User 21 states that there was a byway sign.
- 4.10 **Reasonably alleged and balance of probabilities.** The evidence summarised in paragraph 4.9 above regarding signage prior to 2012 is sharply conflicting and the two opposing views cannot be reconciled with one another. The meaning of 'reasonably alleged' is set out in the

⁴⁴ User 1 and 11, 16

⁴⁵ 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 (except for the Bridleway Only sign), 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31,

*Bagshaw*⁴⁶ judgement and that judgement makes it clear that if it is possible to reasonably accept one side and reasonably reject the other then there is a reasonable allegation and an order should be made.

- 4.11 The Authority was not, and is still not, in possession of any documentary evidence, such as photographs or invoices, to determine whether there were private signs in place at any point prior to 2012. The Authority was therefore compelled to rely on the UEFs and witness statements which have been submitted both in support and in opposition to the Application. In this circumstance there was a reasonable allegation that there were no private signs prior to 2012 and it was on this basis that the Order was made.
- 4.12 However, the Order must now be determined based on the balance of probabilities. As stated above, there is a significant volume of sharply conflicting witness evidence and the two opposing views cannot be reconciled with one another. It will therefore be necessary for a public inquiry to be held to allow the witnesses to give evidence in chief and be cross examined on their evidence to determine the facts of the case on the balance of probabilities.
- 4.13 If the date of challenge to public motorised vehicular use of the Order Route is taken to be 2001 when the “*Bridleway Only*” signs were erected then the Relevant Period under section 31 of the 1980 Act would run from 1981 to 2001. During this period:
- 11 people⁴⁷ used the Order Route on foot during each of those 20 years and 4 people⁴⁸ used the Order Route for a shorter period of time during that period,
 - three people⁴⁹ used the Order Route on horse during each of those 20 years and 10 people⁵⁰ used the Order Route for a shorter period of time during that period,

⁴⁶ R v SSE ex parte Bagshaw and Norton [1994] 68P & CR402

⁴⁷ Users 1, 7, 11, 13/14, 16, 18, 19, 21/31, 23, 28 and 30

⁴⁸ Users 3, 9, 27 and 34

⁴⁹ Users 5, 11 and 28

⁵⁰ Users 2, 3, 8, 12, 13, 16, 29, 34, 45 and 48

- six people⁵¹ used the Order Route on bicycle/carriage during each of those 20 years,
- nine people⁵² used the Order Route in motor vehicles during each of those 20 years and four people⁵³ used the Order Route for a shorter period of time during that period.

In total 13 people⁵⁴ used the Order Route during each of those 20 years with each User using the Order Route with an average frequency of 119 times per year. An additional 10 people⁵⁵ used the Order Route for just part of the Relevant Period. This level of use is sufficient to demonstrate that the Order Route has been used by the public as of right on foot, horse, bicycle and in motor vehicles for the 20 years required by section 31 of the 1980 Act. However, the Authority regards a public inquiry to be necessary to determine whether the landowner erected signage to demonstrate a lack of intention to dedicate to the public.

4.14 NERC Exemptions. 13 people⁵⁶ used the Order Route in motorised vehicles between May 2001 and May 2006 and during this period they used the Order Route a combined total of 1398 times in motor vehicles. During this same period, 20 people⁵⁷ used the Order Route on foot, horse, bicycle/carriage between May 2001 and May 2006 and during this period they used the Order Route a combined total of 7031 times using non-motorised means.⁵⁸ The main lawful use of the Order Route during this period was for non-motorised vehicles and the Order Route does not therefore qualify for the exemption under section 67(2)(a) of the Natural Environment and Rural Communities Act 2006 (“the 2006 Act”) relating to the preservation of motorised rights.

4.15 Furthermore, as stated in paragraph 3.8 the Order Route was not recorded on the List of Streets immediately before 2 May 2006. There is no

⁵¹ Users 1, 11, 18, 28, 30 and 21/31

⁵² Users 1, 5, 7, 10, 11, 19, 23, 30 and 16/31

⁵³ Users 2, 3, 9 and 13

⁵⁴ Users 1, 3/31, 5, 7, 10, 11, 14, 16/45, 18, 19, 23, 28 and 30

⁵⁵ Users 2, 8, 9, 12, 13, 21, 27, 29, 34 and 48

⁵⁶ Users 1, 3, 5, 7, 9, 10, 11, 16, 19, 20, 22, 23, 30

⁵⁷ Users 1, 3, 5, 7, 8, 9, 11, 12, 16, 18, 19, 22, 21, 23, 27, 28, 29, 30, 34, 45

⁵⁸ Used 1764 on foot, 4788 on horse and 479 on bicycle/carriage during the five year period.

evidence that the Order Route was created on terms which expressly provided for use by motor vehicles. The Order Route has been physically constructed as a rough track and was not created by the construction, in exercise of powers conferred by virtue of an enactment, with the intention that it be used by motor vehicles. The earliest evidence of use is 1935⁵⁹ and consequently there is no evidence that the Order Route acquired motorised vehicular rights through presumed dedication during a period ending before 1 December 1930. The Order Route does not qualify for any of the exemptions under sections 67(2)(a) to (e) of the 2006 Act and any motorised vehicular rights which previously existed would have been extinguished on 2 May 2006 by virtue of section 67(1) of the 2006 Act. The Order Route would therefore have been automatically downgraded to a restricted byway.

4.16 **Limitations.** 37 Users⁶⁰ state that there has always been a gate at point A on the Order Map. Only User 17 states that there was not a gate on the Order Route and the remaining users are ambiguous on the issue. User 6 states that the gate has been present since they started using the Order Route in 1935 and the gate is visible in the Google Streetview imagery taken in August 2009. The right of the landowner to erect and maintain a field gate at point A on the Order Map would therefore be a limitation upon the dedication of the Order Route as a public right of way.

4.17 Five users⁶¹ state that there was also a gate a point B on the Order Map and during site visits carried out by the Case Officer in 2016 there was an old gate leaning against the fence at this location. However, this is not supported by the other users and witnesses and three of these users who refer to its existence state that it had fallen down or fallen into disrepair. It is therefore most likely that any gate at this location had fallen into such a state of disrepair that it effectively ceased to function as a gate. Consequently, there is insufficient evidence to show on the balance of

⁵⁹ User 6

⁶⁰ Users 1, 2, 3, 6, 7, 8, 10, 12, 13, 14, 16, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 35, 36, 37 and 38, 39, 42, 43, 47, 48, 50, 51, 52, 53, 55

⁶¹ Users 7, 36, 39 and 43, 55

probabilities that a gate at this location was a limitation at the time of dedication.

4.18 **Width.** The Order Route currently physically exists on the ground as a 3.1 metre wide track. Five users⁶² have not addressed the question of whether the width of the Order Route has changed and User 11 has answered this question in the context of a recent gate restricting the width of the Order Route. However, all other users have stated that the width of the Order Route has not changed. If the Order Route has acquired public rights then these would exist over a consistent width of 3.1 metres.

5. Conclusion

5.1 There was a reasonable allegation that the Order Route had become a public restricted byway through presumed dedication under section 31(1) of the 1980 Act. The Authority was therefore under a statutory duty to make a Definitive Map Modification Order to record the Order Route as a restricted byway on the DM&S in consequence of an occurrence of an event under section 53(3)(c)(i) of the Wildlife and Countryside Act 1981.

5.2 It will be necessary to hold a public inquiry to determine whether on the balance of probabilities the Order Route is a public right of way.

5.3 The Authority respectfully requests that the Inspector determines the Order.

⁶² Users 4, 6, 17, 18 and 31